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IN THE

Supreme Court of the United States

October Term, 1946

No. 1298

ESTATE OF ADA M. WILKINSON,
Central Hanover Bank & Trust Company, Executor,
Petitioner,
against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT, AND BRIEF IN
SUPPORT THEREOF

DENIS B. MADUBO,
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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

The petitioner, Estate of Ada M. Wilkinson, by Central Hanover Bank & Trust Company, Executor, for its petition herein respectfully shows to this Honorable Court as follows:

Opinions Below

The opinion of the Circuit Court of Appeals, Second Circuit, filed on January 29, 1947 is reported at 159 F. (2d) 167 (R. 57-60). The opinion of The Tax Court of the United States filed on February 20, 1946 is reported at 5 T.C. 1246 (R. 35-42).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

This proceeding involves a deficiency in estate tax in the amount of \$200,245.90, determined in a notice of deficiency dated and mailed on June 15, 1944 by the Commissioner of Internal Revenue to the petitioner (R. 14-26). The petition to The Tax Court of the United States was filed on September 12, 1944 (R. 3-13). The findings of fact and opinion of the Tax Court were promulgated on December 13, 1945 (R. 35-42). The decision of the Tax Court determining an overpayment in estate tax of \$2,016.45 (which amount was paid after the mailing of the notice of deficiency) was entered on February 20, 1946 (R. 43). The petition for review by the Circuit Court of Appeals, Second Circuit, with assignments of error, were filed by the petitioner on May 17, 1946 (R. 44-51). The decision of the Circuit Court of Appeals, Second Circuit, affirming the order of the Tax Court was rendered on January 29, 1947 (R. 57-60).

The judgment sought to be reviewed in this proceeding is the judgment of the Circuit Court of Appeals, Second Circuit, filed on January 29, 1947 (R. 61) affirming the order of The Tax Court of the United States.

The reasons why this Court should exercise its power of review are specifically set forth in this petition, pages 7-9, under the caption **REASONS FOR GRANTING PETITION**.

The statute, the construction of which is the sole issue involved in this proceeding, is Section 812(c) of the In-

ternal Revenue Code (26 U. S. C. 1940 ed., sec. 812). The pertinent provisions of the statute are as follows:

"SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * *

(c) *Property Previously Taxed.*—An amount equal to the value of any property (A) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, * * * where such property can be identified as having been received by the decedent * * * from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. This deduction shall be allowed only where * * * an estate tax imposed under this subchapter, the Revenue Act of 1926, 44 Stat. 69, or any prior Act of Congress, was finally determined and paid by or on behalf of * * * the estate of such prior decedent, as the case may be, and only in the amount finally determined as the value of such property in determining the value of the gift, or the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate, and only if in determining the value of the net estate of the prior decedent no deduction was allowable under this paragraph in respect of the property or property given in exchange therefor.

Where a deduction was allowed of any mortgage or other lien in determining the * * * estate tax of the prior decedent, which was paid in whole or in

part prior to the decedent's death, then the deduction allowable under this paragraph shall be reduced by the amount so paid. The deduction allowable under this subsection shall be reduced by an amount which bears the same ratio to the amounts allowed as deductions under subsections (a), (b) and (d) as the amount otherwise deductible under this subsection bears to the value of the decedent's gross estate. Where the property referred to in this subsection consists of two or more items the aggregate value of such items shall be used for the purpose of computing the deduction."

* * *

Question Presented

Whether, where a wife was sole legatee under her husband's estate and died within 5 years after his death, the "property" entitled to relief from double taxation under Section 812(c) of the Internal Revenue Code is the physical items of property previously taxed in the husband's estate and physically identified in the wife's estate, or only the wife's equity therein as sole legatee as of the date of the husband's death?

Summary Statement

All the facts were stipulated (R. 36-39). The dollar figures involved are immaterial, and are only mentioned in the interest of clarification.

A wife (petitioner's decedent) was the sole legatee, devisee and executrix under her husband's gross estate which was finally appraised at \$3,421,672.83 with allowable

deductions of \$411,039.73, leaving a net taxable estate of \$3,010,633.10 (R. 37).

The wife died within 5 years after her husband's death (R. 36). The wife's estate includes items of securities, life insurance and real estate, each physically identified as property previously taxed in and received by the wife from the husband's estate, and valued at \$2,477,631.67 in the husband's estate and at a higher value in the wife's estate. The identified securities constitute \$2,341,421.90 of the said previously taxed property (R. 39).

The wife's estate claimed a deduction (before proportionate reduction) in respect of the full \$2,477,631.67 of identified previously taxed property. The respondent decreased this amount to \$1,627,174.47 by denying any deduction to \$850,427.20 of the identified securities (R. 39).

The sole controversy is the extent to which the identified securities constitute previously taxed property in respect of which relief from double taxation is allowable under Section 812(c) I.R.C.

The controversy arises because the said identified securities had been received by the wife as part of two distributions of personal property, totaling \$2,976,032.12, made by the husband's estate before all its obligations had been paid; and after receiving these distributions the wife paid the full balance of those remaining obligations amounting to \$1,080,961.77 (R. 38, 39).

The respondent determined that under Section 812(c) I.R.C. the previously taxed property entitled to relief from double taxation is limited to property received "by gift,

bequest, devise or inheritance"; and the respondent construed those words of inheritance to limit the relief from double taxation to the wife's inheritable equity in the previously taxed property, and further only to the extent such inheritable equity can be identified (R. 26, 39).

Upon this construction of the statute, the respondent determined that the wife's inheritable equity in the \$2,341,421.90 of identified securities could not include their proportionate share of all obligations of the husband's estate paid by the wife. The respondent determined this excluded amount to be \$850,457.20 by applying against the identified securities a percentage figure of approximately 36½%, this being the ratio of (a) the obligations of the husband's estate paid by the wife (\$1,080,961.77), to, (b) the value of all distributed personal property (\$2,976,032.12) received by the wife from the husband's estate before all its obligations had been paid by its executrix (R. 39).

The Tax Court upheld the amount of deduction as determined and allowed by the respondent and entered decision under Rule 50 (R. 43). The Circuit Court of Appeals, Second Circuit, affirmed the order of the Tax Court (R. 61).

The petitioner contends that under Section 812(c) I.R.C. the "property" entitled to relief from double taxation is the physical items of property previously taxed in the husband's estate (prior decedent) and physically identified in the wife's estate (second decedent), and not merely the wife's inheritable equity therein as sole legatee as of the date of the husband's death.

Reasons for Granting Petition

1. The Circuit Court of Appeals has rendered a decision which, as expressly admitted in its opinion (R. 59), is contrary "in principle" to the decision of the First Circuit on the same issue of law in *Commissioner v. Garland*, 136 F. (2d) 82 (1943). In the *Garland* case the First Circuit rejected, as "beyond the permissible limits of statutory interpretation", the construction which is the same in principle as the construction given to Section 812(c) I.R.C. by the Second Circuit in its decision herein and urged in both cases by the Commissioner.
2. The Circuit Court of Appeals has decided an important question of federal law relating to the construction of specific words of inheritance in a statute in a way probably in conflict with the applicable decision of this Court in *Beulah B. Crane v. Commissioner*, — U. S. —, decided April 14, 1947. The Circuit Court of Appeals in its decision herein construed the statutory words of inheritance "by gift, bequest, devise or inheritance" as limiting the statutory word "property" to only the equity of the petitioner's decedent (sole legatee) in the gross estate of the prior decedent as of the date of the latter's death. The same words of inheritance are used in the statute involved in the *Crane* case, and in principle the same construction was urged by the taxpayer in the *Crane* case and rejected by this Court.
3. The Circuit Court of Appeals has decided an important question of federal law relating to the construction of specific words of inheritance in a statute in a way never

before construed either by the Treasury in the administration of the tax laws or by any court in the interpretation of the tax laws. This will create confusion in the proper application of the tax laws. It is a matter of general importance to have uniformity in the interpretation and application of the tax laws, and a departure from this accepted principle calls for an exercise of this Court's power of supervision.

4. The Circuit Court of Appeals has decided an important question of federal law relating to the construction of a statute which provides relief from double taxation of identified previously taxed property received by gift, bequest, devise or inheritance. This question is of general importance to the estates of all taxpayers who die within 5 years after the death of the donor or testator from whom such property was received. This decision is of further general importance because it imposes on the relief from double taxation a limitation never imposed from the time when The Congress first granted that relief in 1918; and it allows a lesser amount of relief from double taxation in respect of inherited personal property passing under a will than in respect of inherited realty or life insurance; and it allows a lesser amount of relief from double taxation in respect of property received by bequest than in respect of property received by *inter vivos* gift. Also, the practical effect of this decision is to leave solely to the discretion of the Commissioner the amount of relief from double taxation allowable in respect of any item of personal property distributed by the executor of the prior decedent's estate before all taxes and debts of the prior

decedent's estate had been paid solely from the principal assets in the hands of its executor, in that this decision makes legally impossible the "identification" of the amount of such distributed property received "by bequest". This decision represents such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

DENIS B. MADURO,
Attorney for Petitioner.

FERDINAND TANNENBAUM,
of Counsel.

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the "Horned Owl" and the "White-tailed Kite".
The Horned Owl was seen in the same place
as the first one, and the White-tailed Kite
was seen near the same place as the second one.

The Horned Owl was seen in the same place
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ESTATE OF ADA M. WILKINSON,
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Respondent.

**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

Opinions Below

The opinions below have been referred to in the petition for writ of certiorari under this same caption.

Jurisdiction

The statement of the grounds on which the jurisdiction of this Court is invoked have been set forth in the petition for writ of certiorari under this same caption.

Statement of the Case

The statement of the case has been set forth in the petition for writ of certiorari under the caption **SUMMARY STATEMENT.**

Specification of Errors

1. The Circuit Court of Appeals erred in holding that, for the purpose of Section 812(c) of the Internal Revenue Code, the "property" entitled to relief from double taxation is limited to the inheritable equity of the second decedent, as sole legatee, in the property identified physically as previously taxed property received from the prior decedent.
2. The Circuit Court of Appeals erred in failing to hold that, for the purpose of Section 812(c) of the Internal Revenue Code, the "property" entitled to relief from double taxation is the physical property identified as property previously taxed in the prior decedent's estate and physically identified in the estate of the second decedent who was sole legatee under the prior decedent's estate.

ARGUMENT

The dominant intent, the plain language, and the legislative history of Section 812(c) of the Internal Revenue Code all support the petitioner's contention that the "property" entitled to relief from double taxation under the statute is the physical items of property previously taxed in the prior decedent's estate and physically identified in the estate of the second decedent who was sole legatee under the prior decedent's estate.

I.

The dominant intent of the statute involved is "completely to avoid the equity of double taxation", and in order to effectuate this intention it is the duty of the courts to "give the statute a construction as broad as the intention itself." (Quoted remarks from opinion of Judge Woolley in *Rodenbough v. United States*, 25 F. (2d) 13 (C. C. A. 3rd) (1928). This can be accomplished only if the relief from double taxation is extended to the full amount of the physically identified previously tax property on the transfer of which the first tax was imposed. If words of inheritance are to be construed to restrict this relief to the interest of the present decedent in the estate of the prior decedent as of the date of the latter's death, then this goes "beyond the permissible limits of statutory interpretation"—the exact remark made by Judge Magruder in *Commissioner v. Garland*, 136 F. (2d) 82 (C. C. A. 1st) (1943), wherein the First Circuit rejected the construction given to the statute involved by the Second Circuit in its decision herein. (The decision herein admits this conflict with the *Garland* case (R. 59).).

II.

The rule *expressio unius est exclusio alterius* negatives the thought that The Congress intended to measure the "property" entitled to relief from double taxation by the equity therein of the sole legatee after deduction of estate taxes or other liens not allowable as a deduction in determining the estate tax of the prior decedent. In 1932 the Ways and Means Committee recommended several changes. (See, *Report 708, 1932 Ways and Means Committee*, submitted with HR 10236, 72nd Congress, 1st Session, reproduced in *CB 1939-1, Part 2*, p. 492.) One of these recommended changes is the requirement (now in the statute) that the value of the previously taxed property be reduced by any mortgage or other lien *allowed as a deduction in determining the estate tax of the prior decedent*. If The Congress had intended to further reduce the value of the previously taxed property by the amount of estate taxes or other liens *not allowable* as a deduction in determining the estate tax of the prior decedent, then The Congress would have said so while it was otherwise restricting the exemption. Furthermore, the said requirement added in 1932 has no meaning and is impossible of application if the decision herein of the Circuit Court of Appeals is correct, because it is impossible for such "mortgages or other liens" to be deducted unless the "property" to be reduced is the full property on the transfer of which the federal estate tax is imposed. (*City Bank Farmers Trust Co. v. Bowers*, 68 F. (2d) 909 (C. C. A. 2d) (1934), certiorari denied 292 U. S. 644.)

III.

The statute only requires that the finally determined federal estate tax of the prior estate be paid "by or on its behalf". These plain words evidence the intent of The Congress that the "property" entitled to relief from double taxation is the property on which the first tax was imposed, and not the equity therein remaining after deduction of the first tax. This intent is further evidenced by the amendment made by the Revenue Act of 1942 whereby the statute no longer requires either payment or proof of payment of the basic federal estate tax of the prior estate. This intent conforms to "the long established practice of the law not to regard the incidence of a tax in the levying of a tax. (*Edwards v. Slocum*, 264 U. S. 261 (1924).)

IV.

The statute makes no distinction in the measure of the property entitled to relief from double taxation, whether the property is received "by gift" or "by bequest, devise or inheritance". The law is clear that the measure of property received "by gift" is the full physical asset on the transfer of which the gift tax is imposed, without reduction by the amount of the gift tax. This is true even where the donee personally pays the gift tax, as was the case in *Moore v. Commissioner*, 146 F. (2d) 824 (C. C. A. 2d) (1945). It is contrary to both the plain words and dominant intent of the statute to establish one rule for measuring property received "by gift" and a separate rule for measuring property received "by bequest, devise or inheritance". Those same words of inheritance appear in the statute involved in *Beulah B. Crane v. Commissioner*, — U. S. —, decided April 14, 1947 wherein this Court decided that

"property" (which was received by inheritance) means the physical property and not the equity therein of the legatee as of the date of death of the testator. It appears proper to interpret the *Crane* case as holding that words of inheritance in a tax statute do not constitute "appropriate language" to permit the word "property" to be interpreted to mean only the inheritable equity of the sole legatee as of the date of death of the testator.

V.

The statute makes no distinction in the measure of the property entitled to relief from double taxation, whether the property be real estate or life insurance proceeds or securities. However, the construction of the statute by the Circuit Court of Appeals results in granting a lesser amount of relief from double taxation in respect of personal property received "by bequest" than in respect of real property received "by devise" or life insurance proceeds received "by inheritance". This discrimination is not only important but most unusual, and certainly impairs the dominant intent of the statute to avoid the inequity of double taxation of "property". If The Congress had intended this discrimination, it would have used appropriate language which does not appear in the statute. (See, *Brewster v. Gage*, 280 U. S. 327 (1930).)

VI.

The deduction for previously taxed property has been in the statute since 1918 and has been regularly paraphrased and explained by the Treasury Regulations. However, up to the present time, there is not the slightest suggestion in any of the Treasury Regulations that the words of in-

heritance "by gift, bequest, devise or inheritance" are to be interpreted to have a meaning different than their meaning in any other tax statute. Moreover, in this period of almost 30 years no court has construed these words of inheritance as limiting the term "previously taxed property" to only the inheritable equity of the sole legatee. In support of its decision the Circuit Court of Appeals cites (R. 60) the case of *Bahr v. Commissioner*, 119 F. (2d) 371 (C. C. A. 5) (1941) certiorari denied 314 U. S. 650, and in doing so the Second Circuit is again in conflict with the First Circuit which, in *Commissioner v. Garland, supra*, held that the *Bahr* case is not applicable where the prior decedent's estate is a completely administered estate at the death of the second decedent. (The First Circuit also distinguished the *Bahr* case on other grounds.)

CONCLUSION

Upon the grounds stated in the petition, and in this brief, the petition for writ of certiorari should be granted.

Respectfully submitted,

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